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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment to the Commission's Rules	)	
Regarding a Plan for Sharing	)	WT Docket No. 95-157
the Costs of Microwave Relocation	)	RM-8643

PETITION FOR PARTIAL CLARIFICATION AND RECONSIDERATION

The Association of American Railroads

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SUMMARY

The Association of American Railroads ("AAR") commends the Commission for the result of its efforts to create rules governing the complex issue of Microwave relocation. While supporting the bulk of the Commission's rules, AAR requests that the Commission reconsider several of its new rules because they do not ensure that incumbents will be made whole as a result of relocations -- one of the Commission's main goals in this proceeding.

The Commission's new rules defining "comparable facilities" do not ensure that incumbents will be made whole following relocation, and should be reconsidered.

The Commission should also reconsider the two-percent cap on the reimbursement of an incumbent's reasonable transaction costs. This limit is arbitrary and has no rational basis -- there is no reason that a PCS licensee should not be required to reimburse all of an incumbent's legitimate and prudent transaction costs.

In addition, the Commission should reconsider the ten year sunset on a PCS licensee's reimbursement obligations under the cost-sharing plan. This ten year limit will induce PCS licensee to delay building out their systems in remote and rural areas. There is no reason why PCS licensees should not pay for relocations from which they benefit, regardless of when they occur.

Finally, the Commission must clarify the extent of access an incumbent must provide a PCS licensee to inspect its facilities. The new rule gives no guidelines on this issue. To avoid placing further burden on incumbents, the Commission must assure them that they are only required to provide limited and controlled access.

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Pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, the Association of American Railroads ("AAR"), by its attorneys, hereby respectfully seeks partial clarification and reconsideration of the Federal Communications Commission's First Report and Order ("First R & O") adopted April 25, 1996, in the above-captioned proceeding.[1/]

On balance, AAR applauds the Commission for the result of its efforts to create a regulatory regime to handle the complex issue of 2 GHz microwave relocation. The Commission has done an excellent job of balancing the competing interests of incumbent microwave users and emerging technology providers. There are, however, several portions of the Commission's new rules which AAR believes do not adequately protect incumbents' interests. In addition, there are several points on which AAR seeks clarification from the Commission.

1/ First Report and Order and Further Notice of Proposed Rule Making, FCC 96-196 (April 30, 1996), 61 Fed. Reg. 29,679 (1996) ("First R & O" or "Further Notice").

I. INTRODUCTION

AAR has participated actively in every stage of the Commission's proceedings relating to the relocation of the 2 GHz band.[2/] At each stage, AAR has sought to ensure that the Commission adopt microwave relocation rules which are fair to incumbents and adequately protect the interests of its member railroads. Throughout this proceeding, AAR's paramount concern has been that the Commission adopt rules which do not degrade the critical safety uses of AAR member railroads' uses of their microwave systems. Any compromise in the quality of the railroads' communications networks could endanger both life and property.[3/] AAR has also sought to ensure

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2/ See, e.g., AAR Petition for Clarification, filed March 23, 1992; Petition to Suspend Proceeding, filed by AAR, the Large Public Power Council and the American Petroleum Institute on April 10, 1992; AAR Comments, ET Docket No. 92-9, filed January 13, 1993; AAR Reply Comments, ET Docket No. 92-9, filed February 12, 1993; AAR Reply Comments, ET Docket No. 92-9, filed November 18, 1993; AAR Comments, ET Docket No. 94-32, filed December 19, 1994; AAR Reply Comments, ET Docket No. 94-32, filed January 3, 1995; AAR Comments in response to Pacific Bell Mobile Services ("Pacific Bell") Petition for Rule Making, filed June 15, 1995; AAR Reply Comments in response to Pacific Bell Petition for Rule Making, filed June 30, 1995; AAR Comments to NPRM in WT Docket No. 95-157, filed November 30, 1996; AAR Reply Comments to NPRM in WT Docket No. 95-157, filed January 16, 1996; AAR Comments to First Report and Order and Further NPRM in WT Docket No. 95-157, filed May 28, 1996; AAR Reply Comments to First Report and Order and Further NPRM in WT Docket No. 95-157, filed June 7, 1996.

3/ The railroads rely on fixed service communications systems to support critical safety functions for more than 1.2 million train cars on more than 215,000 miles of track. These systems not only remotely control the switching of tracks necessary for safe routing of trains, but also relay critical telemetry data from trackside defect detectors located throughout the rail network

that the Commission adopt rules which require that microwave incumbents be made completely whole when they are relocated involuntarily.

While AAR supports the majority of the relocation rules adopted by the Commission in the First R & O, several of the new rules do not protect incumbents' rights adequately and should be reconsidered by the Commission. The new rules defining comparable facilities following involuntary relocations in new Section 101.75(b), for instance, do not require PCS licensees to make incumbents completely whole following involuntary relocations. This is unfair to incumbents and is contrary to one of the Commission's underlying goals of this proceeding -- ensuring that incumbents be made whole following involuntary relocations. AAR therefore requests that the Commission reconsider these rules and adopt in their place regulations which require PCS licensees to make incumbents completely whole following involuntary relocations.

AAR also requests that the Commission reconsider new Section 101.75(a)(1) regarding a two-percent limit on the recovery of transaction costs incurred by incumbents. This limit is arbitrary and unfairly prohibits the recovery of legitimate costs incurred by incumbents during the voluntary and mandatory negotiation periods. In addition, AAR requests that the Commission reconsider § 101.79(a) of its new rules regarding the ten year sunset on a PCS licensee's reimbursement obligation for the costs of relocation.

Finally, AAR requests that the Commission clarify two of its new rules. First, AAR seeks clarification of the type and amount of access that PCS licensees may gain

to incumbents' microwave facilities under new § 107.71 of the new rules. Second, AAR requests that the Commission clarify that the trigger for reimbursement obligations under new § 24.247 of the new rules includes both those instances when a PCS system would have interfered with a microwave link and when a microwave link would have interfered with a PCS system.

II. ARGUMENT

A. The Commission's Rules Regarding Comparable Facilities Do Not Protect Incumbents' Rights Adequately and Should be Reconsidered.

The Commission stated that it would consider three factors to determine the comparability of a replacement system following an involuntary relocation: communications throughput, system reliability, and operating cost,[4/] and proposed definitions for each of these factors in the NPRM.[5/] The Commission adopted these definitions, but with several substantial modifications proposed by PCS advocates.[6/] In each case, the definition adopted by the Commission provides substantially less protection for incumbents than the definition originally proposed by the Commission. Each of the definitions fails to require PCS relocators to make incumbents truly whole as a result of involuntary relocations, which was one of the Commissions's principal

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4/ First R & O at ¶ 27.

5/ Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, Notice of Proposed Rule Making, WT Docket No. 95-157, 11 FCC Rcd 1923 (1995) ("NPRM") at ¶¶ 70-78.

6/ First R & O at ¶¶ 28-32.

goals for microwave relocation.[7] AAR urges the Commission to reconsider these definitions for the reasons set forth below.

1. The Five Year Limit for Increased Operating Costs Is Inadequate.

The Commission's new rules require PCS licensees compensate microwave incumbents for increased recurring costs associated with replacement facilities for only five years following relocation,[8] rather than the ten year limit originally proposed.[9] In the NPRM, the Commission correctly "propose[ed] to consider facilities comparable in cases where the specific increased costs associated with the replacement facilities . . . are paid by the party relocating the facility, or the existing microwave operator is fully compensated for those increased costs."[10] By limiting a relocator's reimbursement obligation to five years, the Commission has abandoned the concept of full compensation for displaced incumbents because many forced relocations will impose significant costs on incumbents which will recur well beyond the Commission's five-year reimbursement limit.

7/ See First R & O at ¶ 23 ("Under involuntary relocation, the incumbent is required to relocate, provided the PCS licensee meets the conditions under our rules for making the incumbent whole.")

8/ See 61 Fed. Reg. at 29,694 (1996) (to be codified at 47 C.F.R. §101.75(b)(3)) ("ET licensees must compensate FMS licensees for any increased costs associated with the replacement facilities (*e.g.* additional rental payments, increased utility fees) for five years after relocation").

9/ NPRM at ¶ 74.

10/ Id. (emphasis added).

In the First R & O, the Commission stated:

> Although we originally proposed that recurring costs should be limited to a ten-year license term, we are persuaded by PCS licensees that a five-year time period -- which is the length of a microwave license in the 1850-1990 MHz band -- is a more appropriate time frame, because it strikes an appropriate balance between the burden placed on PCS licensees who must relocate many incumbents, and the burden placed on incumbents who are forced to relocate [11/]

AAR does not agree that requiring microwave incumbents to assume uninvited and substantial recurring costs only five years after being involuntarily relocated represents "an appropriate balance." Rather, the effect of this change will be to place a severe burden on incumbents by requiring them to pay for increased costs they otherwise would not have had to pay after only five years. These increased costs may be quite substantial for some links which prove to be so difficult to relocate that the parties may not be able to arrive at a mutually satisfactory voluntary relocation agreement. An increase in operating costs of fifty to one hundred percent or more is certainly conceivable for some links. Requiring incumbents to pay for such increases after only five years places an impermissible economic burden on microwave incumbents while providing PCS licensees an undeserved economic windfall. Accordingly, AAR respectfully requests the Commission to adopt the ten-year limit for reimbursement of increased recurring costs as originally proposed by the Commission

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11/ First R & O at P 31 (citations omitted). AAR does not see how the length of a microwave license is relevant to the issue of increased recurring costs. Whether the license is for one, five or ten years does not alter the fact that incumbents will be faced with substantial and unwanted increased operating costs only five years after involuntary relocation.

2. The New Throughput Standard Will Shortchange Incumbents.

The Commission's new rules require that a PCS licensee only provide microwave incumbents with enough throughput to satisfy the microwave incumbent's system at the time of the relocation, "not match the total capacity of the FMS system."[12/] Once again, this new rule does not require PCS licensees to satisfy the Commission's goal of making incumbents whole as a result of involuntary relocations.

After an involuntary relocation under this new rule, a replacement system may have less overall capacity than the incumbent's original system. This unfairly penalizes those incumbents who maintain excess throughput capacity in their existing systems in anticipation of future system expansion to accommodate natural growth in their communications needs in support of their operational requirements. Such incumbents would be forced to upgrade the throughput capacity of their replacement systems if they decide to expand their overall capacity, despite the fact that prior to relocation, their system had sufficient throughput capacity to handle such expansion.

This result is unfair to incumbents and places them at a serious economic disadvantage by requiring them to sacrifice the capacity of their present systems. AAR therefore requests that the Commission reconsider § 101.75(b)(1) and instead require PCS licensees to provide incumbents with the overall throughput capacity they possessed prior to an involuntary relocation.

12/ 61 Fed. Reg. at 29,694 (1996) (to be codified at 47 C.F.R. § 101.75(b)(1)) (emphasis added); See also First R & O at ¶ 29.

3. The New System Reliability Standard Works to the Disadvantage of Incumbents

The Commission's new rules require that a PCS licensee provide an incumbent only with "reliability equal to the overall reliability of their system"[13/] rather than the actual reliability of each separate component part of the incumbent's system.[14/] The Commission explained:

> We define comparable reliability as that equal to the overall reliability of the incumbent system, and we will not require the system designer to build the radio link portion of the system to a higher reliability than that of the other components of the system. For example, if an incumbent system had a radio link reliability of 99.9999 percent, but an overall reliability of only 99.999 percent because of limited battery back-up power, we require that the new system have a radio link reliability of 99.999 percent to be considered comparable.[15/]

Again, this new rule does not require PCS licensees to satisfy the Commission's goal of making incumbents whole as a result of involuntary relocations. In fact, incumbents will possess less than they did prior to an involuntary relocation -- they will be denied the most highly reliable parts of their systems.

Just as is the case with the new throughput rule, the new comparability rule for system reliability will punish unfairly those incumbents who maintain a highly reliable radio link portion in their existing systems in anticipation of future system upgrades. These incumbents would be forced to pay to augment the radio reliability of their replacement systems if they decided to upgrade the overall reliability of their systems,

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13/ 61 Fed. Reg. at 29,694 (1995) (to be codified at 47 C.F.R. § 101.75(b)(2)).

14/ First R & O at ¶ 30.

15/ First R & O at ¶ 30 (emphasis added).

despite the fact that prior to relocation, the radio links possessed the reliability to handle such expansion. The Commission should reconsider new § 101.75(b)(2) and in its place adopt a rule requiring PCS licensees to make incumbents fully whole as a result of an involuntary relocation.

B. The Commission's Cap on the Recovery of Transaction Expenses During an Involuntary Relocation is Arbitrary and Should be Raised.

Section 101.75(a)(1) of the Commission's new rules provides that PCS licensees are required to reimburse incumbents for relocation expenses, including "engineering, equipment, site and engineering fees."[16/] PCS licensees must also reimburse incumbents for "any legitimate and prudent transaction expenses" incurred by the incumbent that "are directly attributable to an involuntary relocation."[17/] The reimbursement for transaction expenses is limited, however, "to a cap of two percent of the hard costs involved."[18/] Further, PCS licensees "are not required to pay for the transaction costs incurred by [microwave incumbents] during the voluntary or mandatory periods once the involuntary period is initiated."[19/] AAR requests that the Commission reconsider this rule because it is arbitrary and would unfairly deny

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16/ 61 Fed. Reg. at 29,694 (to be codified at 47 C.F.R. §101.75(a)(1)).

17/ Id.

18/ Id. (emphasis added). The Commission defines hard costs as the "actual costs associated with providing a replacement system, such as equipment, and engineering expenses." Id.

19/ Id.

compensation to an incumbent who participated in good faith relocation negotiations and who made legitimate and prudent expenditures which exceeded the cap.

The Commission gave no reasoning for the selection of the two percent limit on recovery of transaction costs other than to say that it derived the percentage by dividing one single commenter's suggested cap amount by the average per link relocation cost of $250,000.[20/] The Commission went on to state that "a two-percent cap is reasonable and strikes a fair balance between the concerns of PCS licensees and microwave incumbents." AAR respectfully disagrees and asserts that the two percent cap was derived in an arbitrary manner. Further, AAR questions the need to place a limit on the recovery of transaction costs by incumbents at all, since, by their very nature under the rules, such transaction costs must be "legitimate and prudent" and must be "legitimately tied to the provision of comparable facilities" in order to be reimbursable.[21/]

As noted, new § 101.75(a)(1) also provides that a PCS licensee need not reimburse an incumbent for any transaction costs incurred during the voluntary and mandatory negotiation periods once the involuntary relocation period has begun. This provision of the rule will punish unfairly an incumbent who attempted in good faith but failed to negotiate a relocation agreement with a PCS licensee during the voluntary and mandatory negotiation periods. It may also provide incentive to PCS licensees to

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20/ First R & O at ¶ 43.

21/ 61 Fed. Reg. at 29,694 (to be codified at 47 C.F.R. §101.75(a)(1)).

postpone the consummation of negotiations: they can avoid paying for even "legitimate and prudent" transaction expenses of an incumbent.

Because of these consequences, AAR requests that the Commission reconsider new Section 101.75(a)(1). AAR suggests that the Commission instead adopt a rule requiring that all of an incumbent's legitimate and prudent transaction costs be reimbursed by the PCS licensee, regardless of when they were incurred.[22/] Because they are by definition part of relocation expenses, all of an incumbent's legitimate and prudent transaction costs should be reimbursed by PCS licensees in order to accomplish the Commission's goal of making incumbents whole in the relocation process.

C. The Ten Year Sunset Will Harm Incumbents and Should be Eliminated

Section 101.79(a) of the Commission's new rules provides that PCS licensees "are not required to reimburse incumbents for relocation expenses after the relocation rules sunset."[23/] This rule is likely to encourage PCS licensees to delay the buildout of their PCS systems in rural and remote areas until after the expiration of their obligation to reimburse incumbents for the costs of relocation. Accordingly, the rule places a disproportionate burden on incumbents with links in remote and rural areas.

22/ Disagreements over the reasonableness of transaction costs could be settled according to the dispute resolution procedures adopted by the Commission in the First R & O. First R & O at ¶¶ 78-80.

23/ 61 Fed. Reg. at 29,695 (1996) (to be codified at 47 C.F.R. § 101.79(a)) The rule provides that the sunset period will be ten years after the voluntary period begins for the first PCS licensees, which is April 4, 2005. Id.

Absent a system-wide voluntary relocation agreement, an incumbent's remote or rural links may not be relocated until after the sunset date, at which time the incumbent would be forced to pay the costs of relocating the links itself.

In the First R & O, the Commission noted that it had based the length of the sunset period in part on the assumption that an incumbent's microwave equipment would be fully amortized over the length of the sunset period.[24/] AAR believes the Commission's assumption regarding equipment amortization is unsound -- many of AAR's member railroads base the amortization of their microwave equipment over a much longer period than ten years. Incumbents who have recently replaced or upgraded their equipment in rural areas will be placed at a serious economic disadvantage if they are required to relocate those links at their own expense after April 4, 2005.

AAR requests that the Commission reconsider the ten-year sunset rule and adopt a rule which provides that PCS licensees be required to reimburse microwave incumbents for forced relocations without regard to when they occur. Whether a forced relocation occurs after one, fifteen or twenty years, a PCS licensee who benefits from the relocation should be required to pay for the relocation. But for the Commission's reallocation of the 2 GHz band for use by PCS licensees, microwave incumbents would not be required to endure the financial and administrative burden of relocating their communications facilities. Because this spectrum reallocation was for

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24/ First R & O at ¶ 67

the sole benefit of PCS licensees, they are not the microwave incumbents, should be required to bear the financial burden of the relocation

D. The Commission Must Clarify the Reimbursement Trigger for a Cost Sharing Obligation to Arise Under the Cost-Sharing Plan

The Commission's new rules provide that a PCS licensee will obtain reimbursement rights from subsequent licensees only if a subsequent licensee's base station would have posed an interference problem to a relocated link.[25/] The rule does not take into account that interference runs both ways -- PCS base station to microwave link and microwave link to PCS base station. In either of these events, the band must be cleared and the microwave link relocated. Therefore, AAR requests that the Commission clarify that the cost-sharing plan should also create a reimbursement obligation where a relocated link would have posed an interference problem to a PCS licensee's base station or mobile transceivers in the vicinity of the microwave transmitter.

E. The Commission Must Clarify What Type of Access to an Incumbent's Facilities is Required Under the New Rules

Under the Commission's new rules, a microwave incumbent must provide a PCS licensee access to its microwave facilities in order to make a relocation cost estimate if, after the end of the first year of negotiations, a voluntary agreement has not been reached.[26/] Neither the new rule itself nor the Commission in the First R &

25/ First R & O, Appendix A at ¶ 29 (emphasis added); See also NPRM at ¶ 55.

26/ 61 Fed Reg. at 29,694 (to be codified at 47 C.F.R. § 101.71) ("if the parties have not reached an agreement within one year of the commencement of the voluntary

O provide any parameters or guidelines as to the type and amount of access an incumbent is required to provide. AAR requests that the Commission clarify the extent of such access. In making such a clarification, AAR asks the Commission to keep in mind that incumbents such as railroads use their microwave systems for vital safety purposes and therefore can allow only very restricted access to their microwave systems. In addition, the facilities are, in most cases, located at remote mountaintop sites the access to which is time-consuming, expensive and difficult. Further, the Commission should keep in mind that allowing unrestricted access to large system facilities would place an enormous administrative and economic burden on incumbents. AAR suggests that the Commission clarify that one independent examiner designated by each PCS licensee in the region should only have the right to inspect the facilities of a specific incumbent's system one time, subject to reasonable advance notice to the incumbent.

III. CONCLUSION

For the foregoing reasons, AAR respectfully requests the Commission to reconsider and clarify several of the new rules it adopted in the First R & O. As noted, AAR applauds the Commission for its effort to construct a fair and balanced regulatory regime for microwave relocation. The Commission must ensure, however that each of

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period, the FMS licensee must allow the ET licensee (if it so chooses) to gain access to the existing facilities to be relocated so that an independent third party can examine the FMS licensee's 2 GHz system and prepare an estimate of the cost and the time needed to relocate the FMS licensee to comparable facilities. The ET licensee must pay for any such estimate.")

its final rules require that microwave incumbents are made fully whole following involuntary relocations. The Commission must also clarify several provisions in its new rules in order to allow both microwave incumbents and PCS licensees plan their futures.

Respectfully submitted,

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